2014 WL 10250698 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

KENTUCKY SPIRIT HEALTH PLAN, INC., Appellant/Cross-Appellee,
v.
COMMONWEALTH OF KENTUCKY, **FINANCE** &
ADMINISTRATION CABINET, et al., Appellees/Cross-Appellant.

Nos. 2013-CA-1003-MR, 2013-CA-1081-MR.
August 5, 2014.

On Appeal from Franklin Circuit Court, 13-CI-86
Division One (1), Hon. Judge Phillip J. Shepherd

Brief for the Appellees/Cross-Appellants

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iii *STATEMENT OF POINTS AND AUTHORITIES

**i INTRODUCTION*

This appeal concerns a judgment of the Franklin Circuit Court holding that Kentucky Spirit Health Plan, Inc., a state-contracted Medicaid managed care organization ("MCO"), was required to cover Preventive Health Services provided to children in school clinics by registered nurses employed with local health departments, as had been done under "fee-for-service" Medicaid. The ruling was correct because, *inter alia*, Kentucky Spirit was required to cover its Members "at the appropriate level, in the appropriate setting and as necessary to meet Members' needs to the extent services are currently provided." Kentucky Spirit seeks reversal premised upon arguments which misdirect the focus to an unrelated subset of medical services, and misrepresent the scope of practice of registered nurses. While the circuit court's ruling on the merits should be upheld, the Commonwealth has cross-appealed because the circuit court wrongly employed a *de novo* standard of review in ruling upon what was an appeal of an administrative determination.

COUNTERSTATEMENT OF THE CASE

The underlying fact pattern of the case is brief and not materially in dispute between the parlies. However, because Kentucky Spirit's Statement of the Case infuses the narrative with irrelevant innuendo and contains some actual argument regarding the meaning and applicability of certain statutes, regulations, terms in its contract, and provisions of the State Plan, the Commonwealth does not accept it, and sets forth its Counterstatement of the Case as follows: [1]

I. FACTUAL BACKGROUND OF THE CASE

The Medicaid program exists to provide medical and related services to citizens who are indigent, **elderly**, or disabled. In Kentucky, hundreds of thousands of citizens are Medicaid-eligible. (RA 6, ¶ 14.) Prior to November 2011, Medicaid recipients and their ***2** care providers in the 104 counties at issue in this action operated under a system known as "fee-for-service." (RA 8, ¶ 20.) Under this system, DMS was directly billed for services provided by approved physicians, dentists and the like, at standardized rates. DMS compensated the providers for covered services according to the rate schedule.

"Preventive Health Services" is a term that encompasses a wide category of commonplace medical services. *See* 907 KAR 1:360. [2] Generally, Preventive Health Services were covered by Medicaid during the "fee-for-service" period. More specifically, for several years prior to November 2011, DMS had regularly compensated local health departments and the state-level Department for Public Health for Preventive Health Services provided to Medicaid-eligible children in school-based clinics, where registered nurses employed by the health department would render care. (AR 8: "[P]rior to November 1, 2011, the Department of Medicaid Services reimbursed local health departments for preventive and remedial public health services performed at school-based clinics by nurses of the respective health departments.") Moreover, compensation was provided at rates set forth in the Medicare Physician Fee Schedule. (AR 80: "Preventive health services have historically been provided by the public health departments through nurses in satellite clinics located in the schools and have been covered by the Department of Medicaid Services (DMS) at Medicare rates.") Such compensation was part of the ***3** federally-approved Medicaid State Plan, having been included through State Plan Amendment ("SPA") 03-021, effective July 1, 2003. (AR 100-03; *see also* p. 17, *infra.*) [3]

Medicaid administration in the 104 subject Kentucky counties was switched from "fec-for-service" to "managed care" in 2011. (RA 8, ¶ 21.) Under the managed care system, Medicaid recipients arc enrolled as members with a for-profit Managed Care Organization ("MCO"). The MCO contracts with providers, building a network to deliver healthcare services to its members. When those providers render services, they bill the MCO (instead of DMS) at a pre-established rate. The MCO then compensates the provider if the service is a covered service. For administering Medicaid, the MCO is paid a monthly capitation payment by the Commonwealth based on its number of members. (RA 558, 1133.) The capitation payment, as well as other terms of the managed care arrangement, are set forth in a contract between the MCO and the Commonwealth (the "MCO Contract"). (*See* RA 581-754, key sections of which are attached as **Exhibit 2** and shall be referred to within the exhibit hereafter.) Appendices to the MCO Contract, federal and state statutes and regulations, and the State Plan also govern the MCO-Commonwealth relationship where applicable.

Kentucky Spirit was one of three MCOs selected by the Commonwealth to administer Medicaid in the 104 subject counties. [4] Kentucky Spirit officially began covering members on November 1, 2011. (RA 8, ¶ 21.) Pursuant to the MCO Contract, ***4** Kentucky Spirit was required to offer local public health departments inclusion in its provider network. (Ex. 2, § 28.7.) Consequently, about 59 local health departments became Kentucky Spirit network providers. (*See* RA 121-22. [5])

In the summer of 2012, [6] Kentucky Spirit submitted a dispute to CHFS concerning the reimbursement of claims from local health departments for Preventive Health Services provided in schools by health department nurses. (RA 10, ¶ 35.) The dispute was premised on three central arguments: (1) Preventive Health Services provided by local health departments were not "Covered Services" under the MCO Contract if rendered in school settings, (2) even if such services were covered, local health departments could not seek reimbursement for services provided by "unsupervised" registered nurses, [7] and (3) even if registered nurses could provide compensable services, licensed practical nurses could not. (*See* AR 17-20; RA 562-64.)

Section 40.9 of the MCO Contract provided for submission of the dispute to CHFS. (Ex. 2, § 40.9.) It also slated that Kentucky Spirit "shall be afforded an opportunity to be heard and to offer evidence" in making its case to the Secretary of CHFS, who would issue the final determination. (Id.) However, Kentucky Spirit, beyond attaching exhibits to its correspondence, made no effort to develop the record before the agency, took no discovery, and did not ask for a hearing.

***5 II. PROCEDURAL BACKGROUND OF THE CASE**

The CHFS Secretary issued her determination on August 28, 2012. (RA 15, ¶ 62; AR 7-9.) The Secretary concluded that the history of coverage under "fee-for-service" Medicaid, combined with multiple sections of the MCO Contract, supported an interpretation that Preventive Health Services were "Covered Services" even when performed by local health departments in schools. (*See* AR 8.) The Secretary observed that Kentucky Spirit must have been made aware - whether during MCO Contract negotiations, or negotiations with the Department for Public Health to develop the Ancillary Services Provider Agreement ("ASPA") (*see* AR 104-16), the contract governing Kentucky Spirit's relationship with the local health departments - that such services were commonly provided in schools. Kentucky Spirit's arguments incorrectly focused on a category of services which was distinct from the Preventive Health Services at issue. (AR 8; *see also* pp. 21-25, *infra.*) The Secretary also noted that SPA 03-021 permitted local health departments to bill Kentucky Spirit at Medicare physician rates even if the services were performed by registered nurses, overruling Kentucky Spirit's second point of protest. (AR 9.) However, as SPA 03-021 did not include licensed practical nurses in its list of caregiver-types permitted to perform services billed at Medicare rates, Kentucky Spirit's third point was sustained. (Id.)

On September 12, 2012, Kentucky Spirit appealed the determination of the CHFS Secretary to FAC, as provided for in the MCO Contract and KRS 45A.225 et seq., referenced therein. (AR 1-6; Ex. 2, § 40.9.) Of note, Kentucky Spirit lodged

no objections whatsoever to the handling of its dispute by CHFS, nor did it suggest that it had been denied any of its rights to procedural due process, whether provided contractually, statutorily, or constitutionally. CHFS submitted a response defending its determination. ***6** (AR 78-82.) On January 3, 2013, FAC issued its determination No. 12-35, affirming CHFS's determination in all material respects. (AR 139-46.) FAC's findings and conclusions on the merits were substantially similar to those of CHFS (*see* AR 141-46), and FAC explicitly utilized a heightened standard of review while recognizing that CHFS's determination was entitled to a presumption of correctness. (AR 140-41.)

On January 25, 2013, Kentucky Spirit filed an action in Franklin Circuit Court against the Appellees herein. Styled as an "original action," Kentucky Spirit sought relief only in the form of declarations that FAC's conclusions were erroneous, and injunctions against being forced to act in conformity with the allegedly erroneous conclusions. (*See* RA 17-24.) The Commonwealth answered on February 18, 2013. (RA 34-56.) Thereafter, Kentucky Spirit served no interrogatories, noticed no depositions, and requested no documents. On March 11, 2013, it moved, *inter alia*,[8] for expedited briefing and determination of the case on the merits. (RA 59-61.) The matter was briefed, rapidly but fully, by the parties through dozens of pages of argument. On May 6, 2013, the circuit court held oral arguments. Thereafter, Kentucky Spirit moved to submit a supplemental brief. (RA 1263-64.) The Commonwealth objected, but in the alternative, asked for leave to file a response which it concurrently tendered. (RA 1368-70, 1310-67.) The circuit court permitted each brief to be filed (RA 1373) and entered its Opinion and Order the following week, on May 28, 2013. (RA 1374-82, attached hereto as Exhibit 1.) The circuit court, while finding the case to be an "original action" properly subjected to *de novo* review, ruled on the merits for the Commonwealth, granting it summary judgment.

***7** Kentucky Spirit filed a timely notice of appeal. (RA 1388-89.) The Commonwealth then filed a timely cross-appeal solely on the circuit court's holding with regard to the standard of review. (RC 16-17.) The Commonwealth later filed an amended cross-appeal containing a non-substantive alteration to its notice. (RC 89-90.)

*II *STATEMENT CONCERNING ORAL ARGUMENT*

The Commonwealth requests an oral argument. The arguments presented by each side are unavoidably complex, and made more so by Kentucky Spirit's constant references to "school-based health services." This subset of medical services has no bearing on the case, but requires a nuanced explanation to clarify the distinction. The great importance of the matter to the public, coupled with its complexity, justifies the investment of the Court's time in an oral argument.

***1** Come the Appellees, Commonwealth of Kentucky, **Finance** and Administration Cabinet ("FAC"); Lori Flanery, Secretary of the **Finance** and Administration Cabinet; Commonwealth of Kentucky, Cabinet for Health and Family Services ("CMFS"); Audrey Haynes, Secretary of the Cabinet for Health and Family Services; Commonwealth of Kentucky, Department for Medicaid Services ("DMS"); and Lawrence Kissner, Commissioner of the Department for Medicaid Services (hereinafter collectively referred to as "Appellees" or "the Commonwealth"), by counsel, and for their Combined Brief responding to the appeal of Kentucky Spirit Health Plan, Inc. ("Kentucky Spirit") and presenting their cross-appeal of the same judgment, state the following:

ARGUMENT

I. SUMMARY OF THE ARGUMENT

The main principle in the switch to managed care was that nothing would change for Medicaid recipients in terms of coverage and service availability. That principle is embodied in several sections of the MCO Contract, but none more so than the following:

> "The Contractor shall cover all services for its Members at the appropriate level, in the appropriate setting and as necessary to meet Members' needs to the extent services are currently provided."

(AR 97.)

In short, Kentucky Spirit seeks a ruling that would violate that principle, shrinking coverage for Medicaid recipients to something less than it was under "fee-for-service." The governing documents [9] conclusively establish that Preventive Health Services - the services actually at issue in this case - are Covered Services when performed by local health departments, and while no locational restrictions other than an "appropriate setting" exist, the MCO Contract actually specifies Kentucky Spirit's duty to cover these ***8** services in schools. Registered nurses, who are supervised through detailed health department protocols, may perform these services within the scope of their practice and the departments may bill for those services at Medicare rates, pursuant to a special provision included as part of SPA 03-021. These are the basics which the Commonwealth will cover in Part III below.

Matters become more complicated when the Commonwealth must take up the task of clearing away the clutter which Kentucky Spirit's arguments bring to the table. The "clutter" is comprised of an extensive and constant focus upon a special subset of covered medical services termed "school-based health services" [10] in the Medicaid regulations, and the many faulty offshoots which that misdirected focus engenders. Part of the problem is Kentucky Spirit's myopic, reductive reading of the term in relation to the rest of its coverage obligations: *nothing else in the contract says "school-based, " so we must not have to cover anything else based in schools.* Taking this restrictive interpretation and running with it, Kentucky Spirit branches off into a series of flawed deductions which it uses time and again to lash out at the Commonwealth's positions and the circuit court's holdings.

Another part of the problem is Kentucky Spirit's now persistent [11] habit of veering back and forth between using "school-based health services" as a term of art, then shifting to a generic meaning when it better suits its argument. In short, Kentucky Spirit's ***9** narrow concentration on a distinct form of medical services which it, as a "managed care" organization responsible for the well-being of less fortunate Kentucky citizens, *must* make available in schools blinds it to the possibility that its providers ***may*** offer other covered services in schools. Its habit of generic/specific conflation most flagrantly rears its head when Kentucky Spirit conjures, out of context, a snappy sound-bite from the regulations in an attempt to support this position. (*See* p. 23, *infra.*) The Commonwealth will guide the Court through the meaningful provisions of the governing documents and show the fallacies of Kentucky Spirit's attack on the circuit court's order.

Finally, the Commonwealth cross-appeals on the standard of review. As explained further in the following section and Part V, the circuit court took the view that KRS Chapter 13B, with its codified standard of heightened deference to the findings and conclusions of administrative bodies, did not apply despite Kentucky Spirit asking for nothing more than the reversal of the substance of CHFS's and FAC's determinations. This was error because KRS Chapter 13B applies to every proceeding unless it states otherwise, and no statute (nor the MCO Contract) removed Kentucky Spirit's dispute from its ambit. KRS Chapter 45A, a/k/a the Kentucky Model Procurement Code ("KMPC"), also imparts a "presumption of correctness" upon the decisions of state officials which the circuit court did not observe. The Commonwealth asks this Court to reverse the circuit court's opinion on the standard of review only, and to affirm the opinion on the merits.

II. STANDARD OF REVIEW

From the Commonwealth's perspective, the applicable standard of review in this matter is obscured by virtue of its own cross-appeal on the topic. Suffice it to say that, although the circuit court disagreed with the Commonwealth's contentions and issued a ***10** summary judgment (albeit, in its favor) following *de novo* review, the Commonwealth maintains that the circuit court should have conducted judicial review of FAC Determination No. 12-35 under the auspices of KRS 13B.150 and the standards of common administrative law. Thus, this Court should do the same.

In such case, an extensive deferential standard prohibits the Court from overturning agency determinations unless they are arbitrary, capricious, an **abuse** of discretion, or not otherwise in accordance with the law. *See Pizza Pub of Burnside v. Com., Dept. of ABC,* 416 S.W.3d 780, 786 (Ky. App. 2013). Kentucky Spirit must overcome a substantial burden and show the agency determinations at issue were either unreasonable or a "clear and prejudicial violation" of the law. *Elcon Enterprises; Inc. v. Washington Met. Area Transit Auth.*, 997 F.2d 1472, 1479 (D.C. Cir. 1992). (*See also* RA 1139.) Furthermore, the decisions of state officials concerning any controversy involving a state contract are entitled to a presumption of correctness in accordance with KRS 45A.280. (*See* p. 39, *infra.*)

Additionally, and as the circuit court did in fact acknowledge and apply, the courts "afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing." *Com. ex rel, Stumbo v. Ky. Pub. Service Com'n,* 243 S.W.3d 374, 380 (Ky. App. 2007), citing *Board of Trustees of Judicial Form Retirement System v. Attorney General of Ky.*, 132 S.W.3d 770, 787 (Ky. 2003) and *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). Furthermore, the circuit court recognized that, when construing public contracts, "[t]he rule in construing contracts to which the government is a party is to resolve all ambiguities, presumptions, and implications in its favor. Where the public interest is ***11** affected, an interpretation is preferred which favors the public." *Codell Constr. Co. v. Com.,* 566 S.W.2d 161, 164 (Ky. App. 1978).

Should the Court disagree with the points raised in the Commonwealth's cross-appeal, then the standard of review is *de novo. First Com. Bank of Prestonburg v. West,* 55 S.W.3d 829, 835 (Ky. App. 2000). However, deference to CHFS's interpretations of statutes and regulations within its purview should still be afforded, and the Court should observe the rule of interpreting government contracts in a manner that favors the public interest. *Bluegrass Equine & Tourism Foundation, Inc. v. Com.,* 2013 WL 1919567, *14 (Ky. App. May 10, 2013), citing *Codell.*

III. THE GOVERNING DOCUMENTS AND THE RECORD BELOW CONCLUSIVELY ESTABLISH THAT THE CIRCUIT COURT'S HOLDING ON THE MERITS SHOULD BE AFFIRMED.

While the circuit court's opinion did not direct a great deal of its attention to the nuts and bolts of the applicable statutes, regulations, and contract provisions, it did correctly conclude that they afforded the coverage which Kentucky Spirit contested. Even without relying upon contemporaneous construction of regulatory provisions, or comporting its reading of such provisions with legislative intent, the record allowed the circuit court to rule in the Commonwealth's favor on the strength of the governing documents' plain text. This part of the brief explains why.

A. Preventive Health Services Provided by Local Health Departments in School Settings Arc Covered Services.

Despite the immense size of the MCO Contract, Medicaid administration is no simple matter and the contract itself cannot always answer a question. However, most fortunately in this instance, Section 28.7 provides sufficient detail to resolve the coverage question at issue on its own:

***12** "In consideration of the role that Department for Public Health, which contracts with the local health departments play (*sic*) in promoting population health of the provision of safety net services, the Contractor shall offer a participation agreement to public health departments. Such participation agreements shall include the following provisions:

A. Coverage of the Preventive Health Package pursuant to 907 KAR 1:360.

B. Provide reimbursement at rates commensurate with those provided under Medicare."

(Ex. 2, § 28.7; *see also* p. 2, n. 2, *supra,* for the full text of 907 KAR 1:360(3).)

Item B in the above section will be addressed further below, but a simple reading of the preamble and Item A provides a wealth of information which, on its face, strongly indicates that coverage of Preventive Health Services provided by local health departments outside of their main offices is not only proper, but preferred. The parties explicitly acknowledge the role played by the Department for Public Health and the local health departments in providing vital medical services to the general population. Kentucky Spirit therefore *must* offer participation in the provider network to such entities, and *must* include Preventive Health Services in that coverage. Kentucky Spirit has never disputed this.

i. General Concepts

However, Kentucky Spirit disputes *where* those services can be performed in order to be covered. In the absence of other guidance (though, as discussed below, guidance is offered), a proper interpretation follows overarching concepts that stem either from the contract itself or the law. The latter lacks real specificity, indicating that the place for performance of a contract, if not expressly stated, is determined by construing the contract's terms and ascertaining the parties' intent, if possible. ***13** 17A Am. Jur. 2d *Contracts*, § 482 (1991). However, as the MCO Contract is a government contract, an interpretation is preferred which favors the public. *Codell*, 566 S.W.2d at 164; *see also* Restatement (2d) of Contracts, § 207. Just as important, since 907 KAR 1:360 defines the services at issue, is CHFS's interpretation of that regulation, to which a court must show deference. *Stumbo*, 243 S.W.3d at 380. The long history of coverage under "fee-for-service" Medicaid for local health departments' preventive care activities in schools demonstrates and supports the agency's interpretation of 907 KAR 1:360.

Turning to the broadest terms in the MCO Contract, it states:

> "The Contractor shall be required to provide Covered Services to the extent services are covered for Members at the time of Enrollment."

(Ex. 2, § 30.1, which references Appendix I for further details.)

After listing the general forms of Medicaid coverage, Appendix 1 to the MCO Contract slates that Kentucky Spirit is obligated to provide services "to the extent services are covered for Members under the then current Kentucky Stale Medicaid Plan." (AR 94.) Appendix I, cited above for the guiding principle that coverage under managed care was neither to be expanded nor reduced, also gives the first clue toward answering the *where* question:

> "The Contractor shall cover all services for its Members at the appropriate level, **in the appropriate setting** and as necessary to meet Members' needs to the extent services are currently provided."

(AR 97, emphasis added.)

Besides disavowing any knowledge of prior coverage (OA 3:32:03-3:32:18), Kentucky Spirit has made a routine of pointing to the initial lack of coverage under managed care as it was conducted by Passport of Kentucky in the 14 counties which ***14** Kentucky Spirit does not serve. (RA 1211-12.) As the Commonwealth has explained, this is an "apples-and-oranges" comparison as Passport of Kentucky was authorized under a *different* federal waiver and signed a *different* contract. (RA 1232.) [12]

Returning to the excerpt from Appendix 1, services of all types arc to be covered for Kentucky Spirit's members "in the appropriate setting." The Commonwealth argued and the circuit court agreed that, as a matter of logic and common sense, a school is an appropriate selling for local health departments to provide Preventive Health Services to children. (RA 1178; Ex. 1, pp. 8-9.) For ail of Kentucky Spirit's bluster, it could not and has not denied this.

ii. Terms Specifically Applicable to Preventive Health Services and Local Health Departments

As indicated before, the governing documents provide more direct guidance as to where covered Preventive Health Services may be performed, and where the local health departments may perform covered services. Each provision on the topic supports the Commonwealth's position.

***15** Starting with Preventive Health Services, one may note that the category is not without its own constraints. Section 4 of 907 KAR 1:360, entitled "Service Limitations," contains restrictions that import federal regulatory standards for some services, curb the time frame of covered ultrasounds, and require certain referrals. (*See* RA 1174-75.) This is the place in which a locational restriction on the coverage of Preventive Health Services would logically appear. However, the regulation offers no such restriction.

The local health departments' relationship with Kentucky Spirit is governed by the ASPA, a master contract between Kentucky Spirit and the Department for Public Health ("DPH"). The MCO Contract and all applicable statutes and regulations are incorporated (AR 122, § 3.19), and no locational restrictions on services are found within the ASPA's terms. Moreover, the ASPA states that DPH must "make necessary and appropriate arrangements to assure the availability of Covered Services to Covered Persons during business hours consistent with State/local health departments." (AR 106, § 3.1.) Making Preventive Health Services available to Medicaid-eligible children in schools is entirely consistent with this mandate. Tellingly, the ASPA's definition of "medically necessary" includes the same "appropriate setting" language as the MCO Contract's Appendix I. (AR 105, § 1.9.) [13]

***16 iii. Section 32.8**

Section 32.8 of the MCO Contract is fairly broad, touching on multiple topics related to pediatric care. (*See generally* Ex. 2, § 32.8.) In the opening two paragraphs, Kentucky Spirit's much-debated "school-based health services" are addressed: the MCO is to coordinate such services to prevent duplication of effort, monitor the quality of their delivery through its pre-established program, etc. Then, plainly switching its terminology, the section goes on to state:
"School-Based Services provided by schools are excluded from Contractor coverage and arc paid by the Department through fee-for-service Medicaid when provided by a Medicaid enrolled provider. **School-Based Services provided by public health departments are included in Contractor coverage."**

(Id., emphasis added.)

"School-Based Services" is not a defined term in the governing documents, thus its only rational interpretation is one based on its plain and ordinary meaning. *See Nationwide Mutual Insurance Co. v. Nolan,* 10 S.W.3d 129, 131 (Ky. 1999). "Services" in the context of this contract arc clearly *medical* services, which would include Preventive Health Services, and "School-Based" reasonably means "in a school." The term cannot be read as "school-based **health** services," a term with a set regulatory definition (*see* 907 KAR 1:715(1)(30)), without inserting the word "health" into the text, which is impermissible. A contract must be construed as the parties entered into it, without any additional words. *Alexander v. Theatre Realty Corp.,* 253 Ky. 674, 70 S.W.2d 380, 387-88 (Ky. 1934).

Kentucky Spirit has done its best to make Section 32.8 the primary battleground of the dispute because it realizes the danger a statement as clear as the one above poses. ***17** But it cannot escape two facts: (1) the MCO Contract uses distinct language going beyond the narrow category of "school-based health services" to mandate coverage for local health department activities, and (2) even if it did not (i.e., even if the counter-interpretation urged by Kentucky Spirit was correct), it would mean only that Section 32.8 does not address Preventive Health Services. It would not erase all of the provisions of the governing documents covered above that support the Commonwealth's position.

B. Registered Nurses May Perform Preventive Health Services, and Local Health Departments May Bill Services to Kentucky Spirit at Medicare Physician Rates.

Attachment 3.1-A, Page 7.6.1, as amended by SPA 03-021 effective July 1, 2003 (AR 100-03, attached hereto as **Exhibit 3**), is part of Kentucky's federally approved State Plan. It addresses, *inter alia,* preventive services described elsewhere in the State Plan and in the attachment itself. (Ex. 3, p. 1.) The amendment's central function was to "[allow] the Slate to pay Public Health Clinics [14] at the Medicare Physician fee schedule, and [clarify] covered preventive and remedial services." (RA 46; *see also* RA 56, and p. 12, *supra,* § 28.7, Item B.) SPA 03-021 states that the Covered Services to which it relates can be performed by physicians, physician assistants, advanced registered nurse practitioners, or **registered nurses."** (Ex. 3, p. 1, § 4, emphasis added.)

In this case, Kentucky Spirit's alternative contention has centered on the fact that the vast majority of Preventive Health Services rendered to Medicaid-eligible children in schools is provided by registered nurses, as opposed to physicians or mid-level providers. Its arguments have evolved over time. Each time the Commonwealth revealed Kentucky Spirit's errors. A brief summary follows:

***18 i. The Coding Argument**

Kentucky Spirit initially claimed that nurses were using improper CPT codes to record their services for billing purposes. (RA 10, ¶¶ 35-36.) However, the document on which it relied to make this argument (*see* RA 960-1021) has nothing to do with claims submission to Kentucky Spirit. Rather, it relates to internal recordkeeping by the Department for Public Health. While RNs are supposed to record a service with a "W92" code which physicians and mid-level providers would otherwise record with a code starting in 992, for Medicaid billing purposes there is no difference. The proof is in ASPA Attachment A, which sets forth the Preventive Program Fee Schedule. (AR 127-135.) Attachment A shows several codes beginning in "992" (*see* AR 133), but none beginning in "W92." That is because, for purposes of advancing the claim to Kentucky Spirit, it is all the same - Evaluation and Management services are billed at the same rale by DPH whether a physician or registered nurse performs them.

ii. The Scope Argument

Kentucky Spirit has also argued that registered nurses are not permitted to give medical care outside the scope of their practice as set forth in state statute. (*See* RA 574-75; Appellate Brief, pp. 20-21.) While proving unable time and again to identify precisely what services are being rendered by nurses that it contends are inappropriate and/or uncovered, Kentucky Spirit also misleadingly portrays the scope of nursing practice as set forth in KRS 314.011. In fact, that scope includes "[t]he care, counsel, and health teaching of the ill, injured, or infirm, (and) **the maintenance of health or prevention of illness of others[.]"** KRS 314.011(6)(a) and (b) (emphasis added). Kentucky Spirit is aware of this, as its citation to the statute in their appeal letter to FAC shows. (*See* AR 5.) In briefing, however, Kentucky Spirit simply disregards subsections (a) and (b) of ***19** KRS 314.011 because they are, presumably, inconvenient to its argument. As implied by the statute (and SPA 03-021, which recites the statute's provision on the scope of nursing practice nearly in full), multiple forms of Preventive Health Services are expressly within a nurse's normal scope of practice. [15]

iii. The Supervision Argument

The Commonwealth maintained throughout the dispute process that school nurses were properly supervised by their local health departments (RA 1179, n. 10), and Kentucky Spirit did not formulate a cogent counterargument until the latter stages of briefing. Kentucky Spirit's last salvo was to claim that services were not compensable because registered nurses were unsupervised in

the school setting. (*See* RA 1240.) The Commonwealth thus felt it necessary to explain the standing order/protocol system of supervision to the circuit court. (*See* OA 4:08:36-4:11:01.)

In the Kentucky Board of Nursing's Advisory Opinion Statement #14 ("AOS #14") (RA 1324-28, attached hereto as **Exhibit 4),** the Board reviewed the scope of nursing practice and, *inter alia,* found the use of protocols and standing orders compliant with state statutes, providing the following opinion:

> Nurses may implement physician/provider issued protocols and standing/routine orders, including administration of medications, following nursing assessment. Protocols/orders should be written to reflect treatment of signs and symptoms, and should include parameters for the nurse to consult the physician/ provider. In addition, protocols and standing/routine orders should be officially ***20** approved by the facility medical and nursing staff, or approved by the prescriber for the individual patient.

(Ex. 4, p. 5, Part 6.)

Kentucky Spirit's counterargument is to claim that the use of protocols and standing orders is intended to be limited to *"existing patients of licensed providers."* (RA 1273; Appellate Brief, p. 22, emphasis in originals.) There is no basis whatsoever for reading such a limitation into the opinion. In fact, the paragraph of AOS #14 which precedes the one above disproves Kentucky Spirit's interpretation:

> The terms "protocol" and ''standing or routine orders" are not defined in the *Kentucky Nursing Laws* (KRS Chapter 314) and are often used differently in various health care settings. **Such orders may apply to all patients in a given situation** or be specific pre-printed orders of a given physician/provider. The determination as to when and how "protocols and standing/routine orders" may be implemented by nurses is a matter for internal deliberation by the health care facility.

(Ex. 4, p. 5, Part 6, emphasis added.)

As the Commonwealth's counsel demonstrated at oral argument, the protocols [16] used by nurses of the Department for Public Health are massive (OA 4:08:36-4:08:43); nurses are not on their own, but rather, given detailed guidance on a variety of medical situations, and as instructed by the Board of Nursing, given parameters to consult with physicians. Kentucky Spirit's claim that restrictions on the scope of nursing practice are rendered meaningless (Appellate Brief, p. 22) is meritless hyperbole. [17]

*21 IV. KENTUCKY SPIRIT'S CONTENTIONS REGARDING "SCHOOL-BASED HEALTH SERVICES" ARE INAPPOSITE AND AFFLICT MOST OF ITS ERRONEOUS ARGUMENTS AGAINST THE CIRCUIT COURT'S OPINION.

Since its initial dispute filed with CHFS, Kentucky Spirit's case has rested almost entirely upon continuous references to "school-based health services," even though it recognizes that the services actually at issue are Preventive Health Services as defined in 907 KAR 1:360. (*See* RA 1205.) Kentucky Spirit's reliance on extraneous regulations infects its arguments and attempts to inject ambiguity where it does not exist. Furthering the problem, Kentucky Spirit conflates its usage of "school-based health services" as a term of art with a more generic meaning whenever the latter form better suits its purpose.

The Commonwealth feels it is necessary to explain what "school-based health services" are and help the Court understand how Kentucky Spirit misuses the term. But the Court should keep in mind that the heart of the problem is Kentucky Spirit's unspoken assumption that "school-based" is a descriptor rather than a label. In other words, "school-based health services" is a category of particular services which Kentucky Spirit ***must*** ensure are available in schools to children who need them.

Preventive Health Services ***may*** be provided and covered in schools by local health departments, but when they are, they are not necessarily "school-based health services."

A. Kentucky Spirit's Total Reliance upon Irrelevant Statutes, Regulations and Contract Provisions Is the Fundamental Flaw in Its Case.

At 907 KAR 1:175(1)(30), Kentucky Medicaid regulations define a "school-based health service" as follows:
***22** "SBHS" or "School-based health services" means medically-necessary health services:

(a) Provided for in 907 KAR 1:034 (*sic*) [18]; and

(b) Specified in an individualized education program for a child determined to be eligible under the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. Chapter 33, and 707 KAR Chapter 1.

In essence, this regulation establishes a service category that merely compartmentalizes other subsets: EPSDT services and medical services that are part of an individualized education program ("IEP") [19] for a child eligible for one. Also referred to as "Medicaid Services Provided in Schools" in the State Plan, "school-based health services" can include a wide range of more advanced medical services made necessary by a child with a disability who qualifies for special care under the Individuals with Disabilities Education Act ("IDEA"). [20] Covered services may include: audiology, occupational therapy, physical therapy, behavioral health services, speech services, nursing services, respiratory therapy, and transportation. (AR 60.)

The point is that the "school-based health services" category was created to help ensure compliance with a federal mandate. Services within the category ***must*** be made available by the MCO in schools in order to meet the IDEA's intent and basic standard. Therefore, they have been isolated and conveniently labeled "school-based." But when Kentucky Spirit states that the regulation provides "that **the only** Preventive Health ***23** Services in schools that are covered by Medicaid are EPSDT services provided to a disabled child" in accordance with the child's IEP (*sec* Appellate Brief, p. 1, emphasis added), it is simply wrong. Neither the Preventive Health Services regulation (907 KAR 1:360) nor the "school-based health services" regulation (907 KAR 1:715) says this. Nor does the MCO Contract, or any of the other governing documents. Kentucky Spirit urges a needlessly restrictive spin on the "school-based" label that is out of step with "fee-for- service" era practices and the public interest, each of which lake precedence.

And yet, this is only half the problem. The other difficulty is Kentucky Spirit's incessant comingling of the restrictive regulatory definition with a more ordinary meaning, no better embodied than when Kentucky Spirit triumphantly quotes 907 KAR 17:020(2)(3)(e), which states …

> "An MCO shall not be responsible for the provision or costs of the following: … Except as established in Section 6 of this administration (*sic*) regulation, a school-based health service[,]"

… and asserts that this means Preventive Health Services provided by local health departments in schools are not covered. (*See* Appellant's Brief, p. 8.) Kentucky Spirit cited this regulation early in oral argument (OA 3:19:39-3:20:07), and to the uninitiated, it comes off as a tidy zinger. But there arc two things Kentucky Spirit implies which are not true: (1) that all Preventive Health Services provided in schools are "school-based health services," and (2) that Section 6 of 907 KAR 17:020 provides the exception for coverage of medical services included in a child's IEP. [21] The first is not true because "school-based health services" is already otherwise defined by 907 KAR 1:175(1)(30). ***24** The second is not true for the same basic reason. Section 6 simply does not provide the "exception" because the definitional regulation already does. Instead, Section 6 states:

Pediatric Interface. (1) An MCO shall:
(a) Have procedures to coordinate care for a child receiving a school-based health service or an early intervention service; and

(b) Monitor the continuity and coordination of care for the child receiving a service referenced in paragraph (a) of this subsection as part of its quality assessment and performance improvement (QAPI) program established in 907 KAR 17:025.

(2) Except when a child's course of treatment is interrupted by a school break, after-school hours, or summer break, an MCO shall not be responsible for a service referenced in subsection (1)(a) of this section.

(3) A school-based health service provided by a school district shall not be covered by an MCO.

(4) A school-based health service provided by a local health department shall be covered by an MCO.

907 KAR 17:020(6).

Kentucky Spirit's attempted sleight of hand is revealed: it quotes 907 KAR 17:020(2)(3)(e) as though "school-based health services" was a generic term and implies that the noted exception is where the provisions related to IDEA compliance lay. But it is not true, because it is not necessary; the term is already defined as such by 907 KAR 1:175(0(30). Rather, Section 6 functions similarly to Section 4 of 907 KAR 1:360 (*see* p. 15, *supra*), setting coverage parameters for an established set of services.

This segues neatly to Section 32.8 of the MCO Contract, which reiterates several of the same parameters. However, whereas 907 KAR 17:020(6)(3) and (4) refer to a "school-based health service," Section 32.8 refers to "School-Based Services," a term without definition. (*See* p. 16, *supra.*) As stated previously, Kentucky Spirit has turned Section 32.8 into a battleground and insists that the obvious textual distinction should be ignored based on past shorthand usage of the term in informal correspondence (AR 2, n. ***25** 2) and a training manual. (Appellant's Brief, p. 10.) While Kentucky Spirit's resort to non-contractual documents should be ignored, *see While Log Jellico Coal Co., Inc. v. Zipp,* 32 S.W.3d 92, 94 (Ky. App. 2000), even if it was accepted and found influential, Section 32.8 is not vital to the Commonwealth's argument. Without it, the governing documents still stress the requirement that Kentucky Spirit maintain the access to covered services that existed prior to managed care, and place no locational restriction on the provision of Preventive Health Services by local health departments other than an "appropriate" setting. As it does not and cannot argue that schools are not an appropriate setting for rendering Preventive Health Services to children, Kentucky Spirit cannot withhold coverage regardless of anything provided in the "school-based health services" regulations. Those regulations are inconsequential, but Kentucky Spirit returns to them again and again in its criticism of the circuit court's opinion.

B. Each Attack on the Circuit Court's Opinion in Kentucky Spirit's Brief Contradicts the Governing Documents, the Record, or the Law.

Preliminarily, the Commonwealth must address the issue of ambiguities in the governing documents. The black letter law is that an ambiguity is present when a term or provision is capable of two or more reasonable interpretations. *Central Bank & Trust Co. v. Kincaid,* 617 S.W.2d 32, 33 (Ky. 1981). Of course, both the Commonwealth and Kentucky Spirit contended before the circuit court that the language of the MCO Contract and applicable regulations supported them unambiguously. While not stating it outright, the circuit court evidently found an ambiguity in the text of the MCO Contract, slate regulations, or both. It therefore resorted to interpretive tools such as contemporaneous construction and legislative intent in an effort to construe the relevant provisions accurately. The Commonwealth still posits that the portions of the governing documents ***26** covered in Part III are unambiguous and capable only of a reasonable interpretation that supports its position. However, in the event that this Court is inclined to agree with the circuit court, the Commonwealth submits, in the alternative, that the circuit court's analysis of extrinsic evidence was proper and its conclusions were fully supported by the record. Kentucky Spirit's attacks on the circuit court's opinion lack merit.

i. Historical Availability of Coverage

Kentucky Spirit opens in earnest by accusing the circuit court of improperly relying on parol evidence: namely, the data provided to the circuit court by the Commonwealth that proved - if it needed proving - that under "fee-for-service," Preventive Health Services provided in schools by registered nurses in the employ of local health departments were covered. (RA 1154-63.) This being a finding of CMFS (AR 8) and FAC (AR 142) to which Kentucky Spirit could produce zero contradictory evidence, the Commonwealth is of the position that the matter should have been accepted as fact under KRS 13B.150(2) and KRS 45A.280 with or without evidence in the record. Nonetheless, Kentucky Spirit has never denied that coverage was actually extended in the 104 counties it serves before managed care was initiated. It contests the circuit court's use of that information.

Kentucky Spirit first criticizes the information as parol evidence which should not have been employed in the absence of an ambiguity. (Appellant's Brief, p. 11.) However, not only is the label inapt, [22] but if the circuit court believed there was an ambiguity, its ***27** reliance on this information was sensible given Kentucky Spirit's obligation to maintain services at the level they were provided under "fee-for-service." (AR 97.) Thus, the historical record of coverage is very relevant to understanding what services Kentucky Spirit must cover. Kentucky Spirit tries to argue for the irrelevance of that information (*see* Appellant's Brief, pp. 11 -12), but can only do so by resorting back to the "school-based health services" regulations and the misleading use of the term as previously described. (*See* pp. 22-24, *supra*.)

Kentucky Spirit's repeated renunciation of any prior knowledge of payments for school-based Preventive Health Services during "fee-for-service" is a statement of counsel without support in the record, and should have no bearing on the outcome regardless of its veracity. (*See* p. 14, n. 12, *supra*.) "[A] party who can read and has an opportunity to read the contract which he signs must stand by the words of his contract." *Smith v. Bethlehem Sand & Gravel Co., LLC*, 342 S.W.3d 288, 295 (Ky. App. 2011), quoting *Ky. Road Oiling Co. v. Sharp*, 257 Ky. 378, 78 S.W.2d 38, 42 (Ky. 1934). Kentucky Spirit knew it was obligated to continue to provide Medicaid services to the extent they were currently provided; if it acted with ordinary diligence in entering into the MCO Contract and ASPA, it would have resolved any misunderstandings about what this entailed. Kentucky Spirit must bear the weight of its failure. *See Clayville v. Huff*, 2007 WL 3406911, *4 (Ky. App. Nov. 16, 2007).

***28 ii. Contemporaneous Construction Doctrine**

Next, Kentucky Spirit attacks the circuit court's application of the contemporaneous construction doctrine. The doctrine acts a check on agencies, blocking them from altering long-standing interpretations of statutes and regulations on which others have come to rely, and affording those interpretations ''controlling weight" over counter-interpretations. *See Revenue Cab. v. Lazarus, Inc.*, 49 S.W.3d 172, 174 (Ky. 2001); *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991). Kentucky Spirit is quick to point out that it is not a state agency, but a state contractor. This is an obvious form-over-substance argument, and Kentucky Spirit offers no explanation why this fact should make the contemporaneous construction doctrine inapplicable to them. Unlike a state contractor that constructs a public building, Kentucky Spirit is engaged in a function that was exclusively governmental for decades in Kentucky. Medicaid administration was and still is a highly regulated activity that affects thousands of providers (such as local health departments) and Medicaid-eligible citizens. Moreover, Section 6.1 of the MCO Contract requires Kentucky Spirit to comply with the policies and procedures of DMS. (Ex. 2, § 6.1.) Logically, an agency's policies and procedures will be a reflection of its understanding and interpretation of the statutes and regulations that apply to it. Therefore, the contemporaneous construction doctrine should be applicable to Kentucky Spirit.

Kentucky Spirit also argues against the circuit court's belief that DMS's interpretation of the applicable regulations is "long-standing," noting that it did not begin managed care operations until November 2011. (Appellant's Brief, pp. 14-15.) Kentucky Spirit errs because it confuses managed care regulations with Preventive Health Services regulations and the State Plan provisions pertaining to the compensation of public health departments. The latter control the outcome of this case, and they date back at least to ***29** 2007 (and were effective as of 2003). (*See* RA 46.) Preventive Health Services rendered in schools by

local health departments had been covered and compensated at Medicare physician rates for years *before* the start of managed care; this is the "long-standing interpretation" which is relevant to the inquiry.

Finally, Kentucky Spirit claims the doctrine is misused due to a lack of ambiguity in the regulations and the inherently erroneous nature of the "long-standing interpretation." (Appellant's Brief, pp. 15-16.) In each instance, Kentucky Spirit's argument is tainted by its resort to the "school-based health services" regulations. But to the ambiguity issue, the circuit court can hardly be blamed for believing that an ambiguity was present considering Kentucky Spirit's constant injection of "school-based health services" into the conversation. It recognized that, "taken out of context," certain parts of the Medicaid regulations and MCO Contract may have appeared to support Kentucky Spirit's argument. (Ex. 1, p. 7.) Hence, it found the regulations ambiguous at some level, but it properly utilized interpretive devices such as contemporaneous construction to resolve the issue in the Commonwealth's favor.

iii. Deference to Agency Interpretation

Even in the event that the contemporaneous construction doctrine was not applied, the circuit court was still correct to afford deference to the Commonwealth's established interpretation of the applicable regulations, as expressed in the determinations of CHFS (AR 7-9) and FAC (AR 139-46). *See Stumbo*, 243 S.W.3d at 380 (acknowledging the application of deference even under the auspices of *de novo* review); *see also Chevron*, 467 U.S. at 843 (stating that the principle applies if the statute or regulation is "silent or ambiguous with respect to the specific issue.") Besides reiterating its claim (through use of irrelevant "school-based health services" provisions) that the circuit court's entire ***30** assessment of the governing documents was erroneous, Kentucky Spirit also asserts that the circuit court applied the deference principle to *contractual* language. (*See* Appellant's Brief, p. 16: "The circuit court also erroneously held that Kentucky Spirit's interpretation of the Medicaid regulations, State Plan and *Contract* 'must fail here based on agency deference.' (Opinion at 6.)," emphasis added.) [23]

However, the circuit court did not apply a deference standard to the MCO Contract at all. What follows is the paragraph of the circuit court's opinion from which Kentucky Spirit quoted:

> "Second, agencies, as a matter of comity, should be given deference in interpreting their own statutes and regulations in highly technical matters such as application of Medicaid reimbursement rules, because the agency has special expertise in that subject matter. *See Cabinet for Human Resources v. Jewish Hospital*, 932 S.W.2d 388 (Ky. App. 1996). Kentucky Spirit's attempt to restrict Preventive Health Services must fail here based on agency deference."

(Ex. 1, p. 6.)

iv. Legislative Intent

Turning to the circuit court's analysis of legislative intent, Kentucky Spirit once again criticizes the court for using an interpretive tool in the alleged absence of an ambiguity. (Appellant's Brief, p. 18.) Needless to say, the circuit court may not have perceived an ambiguity had Kentucky Spirit not continued to redirect attention to ***31** "school-based health services" regulations and define the term however it liked depending on the circumstances.

Nevertheless, Kentucky Spirit's main objection is that the circuit court misread KRS 205.560 in attempting to discern legislative intent. In support, Kentucky Spirit selectively quotes the statute, cutting off the first sentence before it reaches a clause less helpful to it. (*See* Appellant's Brief, p. 18.) That sentence reads in full:

> The scope of medical care for which the Cabinet for Health and Family Services undertakes to pay shall be designated and limited by regulations promulgated by the cabinet, *pursuant to the provisions in this section.*

KRS 205.560(1), emphasis added.

The General Assembly is clearly communicating the importance of what follows. What follows is **not** a series of limiting provisos that seek to rein in Medicaid. Rather, KRS 205.560 emphasizes the importance of expansive availability - meeting the most essential needs of Medicaid recipients "on a basis insuring the greatest amount of medical care as defined in KRS 205.510 consonant with the funds available," - complete with a laundry list of the most vital services. No recent amendment to the statute has reduced or limited this list of critical Medicaid services; in fact, most have clarified or expanded it. *See e.g.* 2013 Ky. Acts Ch. 118, § 8 (requiring MCOs to complete provider credentialing within 15 days); 2008 Ky. Acts Ch. 119, § 1 (clarifying available treatments for inborn conditions and making a list of conditions non-exhaustive); 2007 Ky. Acts Ch. 90, § 1 (adding a subsection on smoking cessation treatment interventions and programs). The circuit court accurately captured the gist of the Medicaid statutes in holding that the General Assembly has directed judicial interpretation "in favor of expanded coverage." (Ex. 1, p. 7.)

***32** Undaunted, Kentucky Spirit insists that a statement of the Commonwealth's counsel at oral argument is the "sole support" for the circuit court's conclusion that the "switch from fee-for-service to managed care Medicaid services was meant neither to expand coverage nor restrict it." (Appellant's Brief, p. 19.) This is not only patently untrue, [24] it is silly for Kentucky Spirit to assert, since Kentucky Spirit agreed with the notion in briefing below: "[T]he execution of the Contract is not intended to narrow or widen the scope of Medicaid 'coverage."' (RA 1210.)

Lastly, Kentucky Spirit attacks the circuit court's reference to the ASPA's general mandate to arrange for the availability of necessary services to Medicaid-eligible persons. (Appellant's Brief, p. 20; *see also* p. 15, *supra.*) However, its basis is the same reductive reading of "school-based health services," involving the baseless assumption that no service can be covered in a school if it is not labeled "school-based."

v. Scope of Nursing Practice

To conclude its argument, Kentucky Spirit returns to its fallback position: even if the services are covered, nurses cannot perform them. Many of Kentucky Spirit's points were addressed earlier, both in this brief (*see* pp. 17-20, *supra*) and in briefing and oral argument at the circuit court level. Once again, Kentucky Spirit ignores subsections of KRS 314.011(6) it does not like (Appellant's Brief, p. 21, n. 11) and argues that the Board of Nursing has approved protocols and standing orders for use only for a provider's pre-existing patients (Id., p. 22), which is directly contradictory to AOS #14. (*See* the excerpted language at p. 20, *supra.*)

***33** Kentucky Spirit's argument here provides an example of its self-serving use of regulatory and Slate Plan provisions. It begins by referencing the State Plan's description of "nursing services" within the "Medicaid Services Provided in Schools" category. (Appellant's Brief, p. 20, n. 10.) [25] The restrictiveness of the description is understandable given that the medical services entailed in that category (which, being necessary for children with special conditions, are more advanced) would require a greater level of physician direction. The category is not the one at issue in the case, thus making Kentucky Spirit's point irrelevant, but at least it is not inaccurate as to the "Medicaid Services Provided in Schools"/"school-based health services" category.

By the next paragraph, Kentucky Spirit's discussion has begun to transition away from the limited "Medicaid Services Provided in Schools," with its narrower, guided form of nursing services, to a focus on medical services in general. (*See* Id., p. 21.) It references KRS 314.011 (6) as defining the scope of practice for nurses, but not only is that statutory scope global instead of applicable only to "Medicaid Services Provided in Schools," it also contains far more than Kentucky Spirit cares to mention. (*See* pp. 18-19, *supra.*) In the next paragraph, Kentucky Spirit once again refers to schools, but has left the categorical pretext

behind, now insisting that any service covered by Medicaid, if rendered by a nurse, must be performed in accordance with a physician treatment plan.

This is an obvious overreach, but it is brought about because Kentucky Spirit does not appreciate the distinction between "school-based health services" as a label and the same phrase as a descriptor for any medical service taking place in a school. Unless, of ***34** course, Section 32.8 of the MCO Contract is brought up. (*See* p. 16, *supra.*) Then, the distinction becomes so paramount that Kentucky Spirit will go to any length, including the use extrinsic evidence (*see* Appellant's Brief, p. 10) to insist that the MCO Contract does not mean what it says.

In sum, Kentucky Spirit's alternative argument is based on false portrayals of the scope of nursing practice and AOS #14, and the use of narrower descriptions of nursing services which do not apply to the Preventive Health Services at issue. Its position should therefore be rejected, and the circuit court's opinion should be affirmed on the merits.

V. THE COMMONWEALTH'S CROSS-APPEAL: BECAUSE IT UTILIZED A *DE NOVO* STANDARD AND FAILED TO PRESUME THE CORRECTNESS OF AGENCY FINDINGS, THE CIRCUIT COURT ERRED.

First, the Commonwealth once again notes that the circuit court did correctly apply deference to the regulatory interpretations of CHFS and FAC, and properly observed that all presumptions, inferences and ambiguities in a government contract should be construed in favor of the public interest. The Commonwealth's cross-appeal concerns the circuit court's rejection of the applicability of KRS Chapter 13B to the proceeding, misreading of *Geupel Constr. Co. v. Com.*, 136 S.W.3d 43 (Ky. App. 2003), and lack of recognition of the "presumption of correctness" to the agencies' conclusions which KRS 45A.280 affords.

A. KRS Chapter 13B Applied to Kentucky Spirit's Dispute with CHFS, and Kentucky Spirit's Subsequent Conduct Has Been Entirely Consistent with that of a Party Appealing an Administrative Determination.

The entire process below, from Kentucky Spirit's formal dispute with CHFS to the filing of what it dubbed an "original action" in Franklin Circuit Court, was governed by Section 40.9 of the MCO Contract. It reads, in pertinent part:

***35** Any disputes arising under this Contract which cannot be disposed of by agreement between the parties, shall be decided by the Secretary of the Cabinet for Health and Family Scrvices[.] … The decision of the Secretary or his representative shall be final and conclusive unless, within ten (10) working days following the date of notice to the Contractor of such decision, the Contractor mails or otherwise **furnishes a written appeal to the Secretary of the Finance and Administration Cabinet.**

The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal to the Secretary of the Cabinet for Health and Family Services. Any appeal to the Secretary of the Finance and Administration Cabinet shall be in accordance with KRS Chapter 45A.225 et seq. and regulations promulgated thereunder. …

The Contractor acknowledges that, pursuant to KRS Chapter 45 A.225 et seq., the Secretary of the **Finance** and Administration Cabinet is the final arbiter of any and all disputes concerning the Contract or the Department, **subject to the right of the Contractor to appeal any such determination to the Circuit Court of Franklin County, Kentucky.**

(Ex. 2, § 40.9, emphasis added.)

Initially, the circuit court failed to appreciate that KRS Chapter 13B is applicable to all administrative proceedings unless excepted by KRS 13B.020(2). KRS 13B.020(1) states, "The provisions of this chapter shall apply to all administrative hearings conducted by an agency, with the exception of those specifically exempted under this section." Proceedings under KRS 45A.225 et seq. are not among the exempted hearings listed in KRS 13B.020, thus the chapter, including KRS 13B.150, applies and always has. The circuit court owed deference, as codified by KRS 13B. 150(2), to the administrative determinations

that preceded it. "A court's function in administrative matters is one of review, not reinterpretation." *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002).

***36** As KRS 13B.150 shows, the deference afforded by courts to agency determinations is extensive. "The purpose of judicial review of an appeal from the decision of an administrative agency is to ensure that the agency did not act arbitrarily." *Iles v. Com.*, 320 S.W.3d 107, 111 (Ky. App. 2010). The burden rests with Kentucky Spirit to show that the determinations of CHFS and FAC were either unreasonable or a "clear and prejudicial violation" of the law. *Kroger Co. v. Regional Airport Auth. of Louisville & Jefferson County*, 286 F.3d 382, 389 (6th Cir. 2002).

The circuit court also misapplied of the holding of *Geupel* to the case. In *Geupel*, this Court agreed with the Commonwealth that the trial court improperly heard a *de novo* bench trial of a contractor's appeal from an administrative final order. It stated:

> "We agree that having chosen to pursue its administrative remedy to completion, Geupel was limited by statute to a judicial review of *that* proceeding. It was not entitled under these circumstances to pursue both the administrative process and then seek direct judicial relief in a separate original action.

136 S.W.3d aT 48 (emphasis in original).

Likewise, Kentucky Spirit was "afforded an opportunity to be heard and to offer evidence" in front of CHFS; i.e., it was afforded due process. (*See* Ex. 2, § 40.9.) Kentucky Spirit was granted its opportunity to develop the record before CHFS as it wished, but it chose not to exercise its rights beyond the filing of written protest with attached exhibits. Whether this is because it neglected to use those tools or consciously decided they were not necessary is beside the point. The fact is that Kentucky Spirit pursued an administrative remedy, was unsuccessful in attaining relief, and then advanced to the next forum. This is how the central holding of *Geupel* applies. A state contractor was not permitted "to pursue both the administrative process and then seek ***37** direct judicial relief in a separate original action." 136 S.W.3d at 48. Perhaps Geupel Construction exercised its procedural rights to a greater extent than Kentucky Spirit, but Kentucky Spirit did choose the same path, seeking relief in an executive branch venue before turning to the judicial branch. The circuit court's reference to *Geupel* (*see* Ex. 1, p. 4) suggests it was somehow swayed by the "original action" designation provided by Kentucky Spirit and neglected to observe that, in substance, Kentucky Spirit was merely appealing from an adverse agency action.

To the extent administrative proceedings lacked any of the more common formal elements of proceedings governed by KRS Chapter 13B, the Commonwealth asserts that they were waived by Kentucky Spirit through its own inaction and lack of objection. A party's right to a formal administrative hearing and/or the procedural trappings associated with it can be waived, particularly through its failure to request them. *See Rosenzweig v. Dept. of Transp.*, 979 So.2d 1050, 1052 (Fla. App. 2008) ("[W]e are constrained to affirm the final order because appellants waived their right to go to a formal hearing before the Division of Administrative Hearings by not requesting a formal hearing at any time."); *Weber v. Firemen's Retirement Sys.*, 872 S.W.2d 477, 479 (Mo. 1994) ("Procedural requirements that would otherwise be necessary before a final decision in a contested case may be waived.").

Kentucky Spirit has complained that the MCO Contract never identified the applicability of KRS Chapter 13B, but why did it need to? KRS Chapter 13B was applicable to the MCO Contract as state law (*see* Ex. 2, § 6.2), and this fact was reinforced by the sentence that reminded Kentucky Spirit of its right to be heard and present evidence before CHFS. (*See* p. 35, *supra.*) Kentucky Spirit's arguments below centered on KRS 45A.245, but discounted the fact that its dispute was initially decided by ***38** CHFS, before which Kentucky Spirit was entitled to due process. Kentucky Spirit, however, never utilized written discovery, depositions, a formal hearing, or any other device that would aid it in developing the record other than attaching exhibits to its written dispute. It never stated an objection to the absence of any procedural formalities in its appeal to FAC (or, for that matter, the circuit court). It did nothing to dispel the notion that its action in the Franklin Circuit Court was anything hut an appeal; the Complaint's five counts, though in different ways each time, [26] are asking for the same relief: tell the agencies that they are wrong, and Kentucky Spirit is right. Once in circuit court, Kentucky Spirit again took no depositions or discovery

(despite having filed an alleged "original action"), never objected to the Commonwealth's filing of the Administrative Record (despite its contention that the proceeding was not an appeal), and promptly moved the Court to order an expedited schedule for briefing and argument on the merits. (RA 59-61.) Kentucky Spirit's conduct in this regard is consistent with an appellate proceeding, which is exactly what the MCO Contract says it is to be. (*See Ex.* 2, § 40.9: "…subject to the right of the Contractor to appeal any such determination to the Circuit Court of Franklin County, Kentucky.")

B. KRS 45A.280 Imparts a Presumption of Correctness upon the Determinations of CHFS and FAC.

Finally, the circuit court failed to recognize that other applicable law affords the underlying determinations of state agencies with a presumption of correctness when the matter involves a state contract within the ambit of the KMPC. The MCO contract states ***39** that Kentucky Spirit's dispute resolution process is governed by KRS 45A.225 et seq. Contrary to Kentucky Spirit's bombastic claims (*see* RA 1204), the Commonwealth is *not* asserting that "et seq." means each and every section of KRS Chapter 45A following KRS 45A.225 is incorporated by the contract. The extent of the "et seq." in Section 40.9 is clearly delineated by KRS 45A.225 itself:

> "KRS 45A.225 to 45A.290 apply only to each contract solicited or entered into after January 1, 1979."

KRS 45A.225(2).

Thus, KRS 45A.280 is applicable to the dispute. KRS 45A.280 reads:

> The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a **presumption of correctness** and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

*See also Pendleton Bros. v. **Finance** & Admin. Cabinet,* 758 S.W.2d 24, 28 (Ky. 1988).

Even if KRS Chapter 13B does not apply, the KMPC requires a court to presume the correctness of an agency's decision in controversy arising under a contract between a contractor and the Commonwealth.

The circuit court, to its credit, did acknowledge its duly to defer to the agency's interpretations of relevant statutes and regulations and recognized that state contracts should be construed in a manner that favors the public. *Stumbo,* 243 S.W.3d at 380; *Codell,* 566 S.W.2d at 144. But its failure to recognize and apply these additional forms of deferential review was error, and should be reversed by this Court.

40 *CONCLUSION

That the Commonwealth's briefing below and herein supported its position with a high degree of nuts-and-bolts analysis of the MCO Contract, the State Plan and Medicaid regulations, while the circuit court's opinion focused on overarching themes of the switch to managed care and was anchored in common sense, should say something about the validity of the decision on the merits which Kentucky Spirit has appealed. Any way you slice them, the governing documents *never* state that Preventive Health Services are not covered if provided in a school setting, and to the contrary, place no locational restriction upon such services at all. Services must only be provided in an "appropriate setting." For ail of the arguments Kentucky Spirit has made as it has tried to dodge and parry the Commonwealth's position at every turn, it has never maintained that a school is an inappropriate setting to provide basic preventive and remedial medical service to Medicaid-eligible children. Nor can it articulate a reason why registered nurses cannot render such services which does not directly conflict with the law, the State Plan, or the Board

of Nursing's own position. For the reasons stated herein, the Commonwealth requests that this Court affirm the decision of the Franklin Circuit Court on the merits, and reverse the decision only as to the standard of review.

Respectfully submitted,

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Appendix not available.

Footnotes

1 The Commonwealth shall cite to the Record on Appeal ("RA"), Record on Cross-Appeal ("RC"), the Oral Argument of May 6, 2013 ("OA"), and the Administrative Record ("AR") compiled by FAC in its review of the determination of Kentucky Spirit's dispute by CHFS. (*See* RA 57-58.) The Administrative Record was not paginated with the Record on Appeal, but separately included by the clerk in a manila envelope.

2 "The following medically-necessary preventive, screening, diagnostic, rehabilitative and remedial services provided by the Department for Public Health directly or indirectly through its subcontractors shall be covered:
(1) A chronic disease service;
(2) A communicable disease service;
(3) An early and periodic screening, diagnosis, and treatment (EPSDT) service;
(4) A family planning service;
(5) A maternity service; or
(6) A pediatric service."
907 KAR 1:360(3).

3 The history of Medicaid coverage at Medicare rates for school-based Preventive Health Services provided by local health department nurses is objectively verifiable. While Kentucky Spirit did not deny it outright, it did state there was no evidence of it. (*See* RA 1134, n. 1.) The Commonwealth subsequently provided evidence to satisfy Kentucky Spirit and the circuit court. (RA 1154-63; OA 4:07:21-4:07:57.) Kentucky Spirit now criticizes the circuit court's observation of the very evidence its equivocation demanded. (*See* Appellant's Brief, pp. 11-13, addressed *infra*, pp. 26-27.)

4 WellCare and Coventry were the others. Neither joined Kentucky Spirit's dispute against CHFS.

5 Not all departments on this list are in Kentucky Spirit's network, but the ones that arc not are easily identifiable, as they have less than $1,000 in billings.

6 The noticeable delay in Kentucky Spirit's submission of the dispute was evidently caused by technical difficulties encountered in the transmission of local health department claims to the MCO. While both sides have engaged in finger-pointing (RA 560-61, 1134-35), the matter is immaterial to the merits of this appeal/cross-appcal.

7 Scattered into this issue by Kentucky Spirit is an assertion that services performed by nurses were being billed using improper codes. Since the Commonwealth debunked this contention in briefing (RA 1185), Kentucky Spirit has not returned to it. However, for the sake of comprehensiveness, it is quickly addressed herein. (*See* p. 18, *infra.*)

8 Kentucky Spirit also moved for an order to have certain funds deposited into court, but it has no bearing on the present appeal.

9 Hereafter, the Commonwealth shall use the term "governing documents" as shorthand for an otherwise bulky list of items that are binding upon it and Kentucky Spirit, and ultimately, contain the provisions that resolve the case. These include: the MCO Contract, Appendices to the MCO Contract, federal and stale statutes and regulations related to Medicaid, the State Plan and State Plan Amendments (in particular, SPA 03-021), and the provider contract between the Department for Public Health and Kentucky Spirit (i.e., the "ASPA"), with its attachments as found in the Administrative Record. (See AR 117-35.)

10 In the State Plan one may also find reference to "Medicaid Services Provided in Schools." While set out more extensively in the State Plan, they are essentially the same thing: particularized services for children with special requirements who need regular attention from a medical professional during school hours. (*See* AR 66-74.)

11 This problem was not a feature of Kentucky Spirit's briefing until it first appeared in Kentucky Spirit's reply memorandum, filed May 3, 2013 (RA 1241-60), the Friday before the Monday on which oral arguments were scheduled. (*See* RA 548-49.) It continued through oral argument, Kentucky Spirit's supplemental memorandum, and in Kentucky Spirit's appellate brief, where it is rampant.

12 *See* Appellant's Brief, pp. 12-13. Kentucky Spirit cannot provide a legitimate reason *why* it did not or could not learn that DMS had been compensating focal health departments for Preventive Health Services provided in schools. Kentucky Spirit does not argue information was deliberately withheld, and as the CHFS Secretary recognized, negotiations for both the MCO Contract and the ASPA must have made the information available. (*See* p. 5, *supra.*) Even if Kentucky Spirit did not acquire it on those occasions, the information was public knowledge, and data such as the Commonwealth provided (*see* pp. 2-3, n. 3) was freely available through an open records request or some similar device. Kentucky Spirit has only refuted that contention through the argument of counsel (*see* OA 3:35:56-3:36:22), which is not evidence. *L&N R.R. Co. v. Turner*, 379 S.W.2d 749, 752 (Ky. 1964) ("The unsupported statement of counsel, however, is not evidence"). The circuit court also noted that Kentucky Spirit's parent company, Centene Corporation, is a sophisticated actor in the field with managed care operations under other subsidiaries in 16 different stales. (Ex. 1, p. 7; *see also* RA 5, ¶ 4.) Certainly Kentucky Spirit would not argue that it was unsophisticated, unrepresented by counsel in negotiations, or forced into a contract of adhesion.

13 While it seems to have been abandoned as an argument by Kentucky Spirit, the Commonwealth must quickly address the one attempt by Kentucky Spirit to answer the *where* inquiry with a part of the governing documents that had nothing to do with "school-based health services." Kentucky Spirit originally argued that, within Appendix I to the MCO Contract (which lists the Covered Services to which the MCO is obligated), Item Z's qualifier **"in** Public Health Departments" meant it was only required to cover Preventive Health Services provided literally "in" the main office of the local health department. (*See* RA 569.) This spin ignored the fact that the locational language itself was not exhaustive - by virtue of the phrase "including those" - and the list in which it appeared was not definitional or restrictive in nature, but meant to summarize coverage obligations. (*See* RA 1142, 1176-77; *see also* Ex. 2, § 30.1: **"Appendix I** shall serve as a summary of currently Covered Services[.]")

14 By its text, SPA 03-021 applies to "qualified providers." Kentucky Spirit does not deny that local health departments are qualified providers under state law. (*See* RA 1270.)

15 The more restrictive description of nursing services to which Kentucky Spirit cites (*see* RA 575, n. 71; Appellate Brief, p. 20, n. 10) applies in regard to that particular part of the State Plan because Medicaid Services Provided in Schools and "school-based health services" entail more advanced care; they are intended for children with special needs who have an IEP. (*See* pp. 22, 33, *infra.*) As will be emphasized repeatedly below, these are not the services at issue in this case.

16 Available to be viewed in full at http://chfs.ky.gov/dph/CCSG.htm.

17 While not mentioned in its Appellate Brief, Kentucky Spirit also argued below that, regardless of AOS #14, federal and state regulations required the physical presence of a physician (i.e., "direct supervision") in order for services to be compensable under Medicaid. (RA 1256-58; OA 3:48:00-3:48:53.) As the Commonwealth explained in detail (*see* RA 1318-21), the federal regulations cited by Kentucky Spirit were applicable to Medicare, not Medicaid. *See U.S. ex rel. Keltner v. Lakeshore Medical Clinic, Ltd.*, 2013 WL 1307013, * 5 (E.D. Wisc. Mar. 28, 2013). The state regulation cited by Kentucky Spirit required direct supervision only of "other licensed medical professionals." 907 KAR 3:005(3). However, registered nurses are explicitly excluded from the definition of that term. *See* 907 KAR 3:005(1)(23).

18 The citation should be 907 KAR *11*:034. That regulation describes "early and periodic screening, diagnosis, and treatment services" or "EPSDT services."

19 This term is defined as "a written statement for a child with a disability that is developed, reviewed and revised in accordance with 707 KAR 1:320." 707 KAR 1:002(1)(34).

20 From the U.S. Department of Education: "The Individuals with Disabilities Education Act (IDEA) is a law ensuring services to children with disabilities throughout the nation. IDEA governs how states and public agencies provide early intervention, special education and related services to more than 6.5 million eligible infants, toddlers, children and youth with disabilities." *See* http://idea.ed.gov.

21 Even the circuit court was confused by this at the time of oral argument, finishing Kentucky Spirit's counsel's sentence by insinuating that Section 6, containing what counsel referred to as the "one exception," was where "the IEP" was mentioned. (OA 3:20:05-3:20:12.)

22 "*Parol evidence* has been defined as oral evidence rather than written evidence. Under the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009) (internal citations omitted, emphasis in original). The historical record of coverage was not a term, right or duty being negotiated by the parties, but a fact relevant to an understanding between them that coverage would be offered to Members "to the extent services are currently provided." (AR 97.) The coverage records merely clarify the current extent of services.

23 Since it is once again mentioned in this section of Kentucky Spirit's brief, the Commonwealth will note that Kentucky Spirit's repealed citation to federal regulations which restrict federal funding for Medicaid activities falling outside the Stale Plan is a straw man (or at least, a red herring). The Commonwealth **does not** deny that coverage of services not included in the State Plan might violate federal regulations. However, the Commonwealth **does** deny that coverage of Preventive Health Services in a school setting, rendered by a registered nurse employed with a local health department who follows DPH-approved protocols and standing orders, goes beyond the Slate Plan in any way, or in any way violates federal law.

24 Both Section 30.1 and Appendix I to the MCO Contract support the idea that coverage boundaries were intended to remain sialic as a result of the switch to managed care, with the MCO obligated make services available only to the extent currently covered. (*See* p. 13, *supra.*)

25 Recall that "Medicaid Services Provided in Schools" is category essentially equivalent to "school-based health services," and that neither purports to be the exclusive form of Covered Services available to children in schools. These services *must* be provided in schools to Medicaid-eligible children with an IEP; such children have special needs and require treatment during the school day.

26 Counts I - III each ask for declaratory relief: (1) that the MCO Contract docs not provide coverage, (2) that regulations do not require reimbursement if services arc performed by registered nurses, and (3) mat the State Plan docs not provide coverage. Counts IV and V request injunctions (the first preliminary and the second permanent) against the agencies to prohibit them from forcing Kentucky Spirit to reimburse the local health departments. (*See* RA 17-21.)

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